

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DARTWAUN THIBODEAUX,

Defendant and Appellant.

B209507

(Los Angeles County
Super. Ct. No. BA291855)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Affirmed as modified.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Dartwaun Thibodeaux appeals from a judgment of conviction entered after a jury trial. The jury found defendant guilty of assault with a firearm upon a peace officer (Pen. Code, § 245, subd. (d)(1))¹ in counts 1 and 2; assault with a firearm (§ 245, subd. (a)(2)) in counts 3 through 7; shooting at an occupied car (§ 246) in count 8; discharge of firearm with gross negligence (§ 246.3) in count 9; unlawful possession of firearm (§ 12021, subd. (a)(1)) in count 10; and unlawful possession of ammunition (§ 12316, subd. (b)(1)) in count 11. The jury also found true the allegations as to counts 1 and 2 that defendant personally used a firearm and/or personally and intentionally discharged a firearm (§§ 12022.53, subds. (b) & (c), 12022.5, subds. (a) & (d)). In a bifurcated proceeding, the trial court found not true the allegation that defendant had suffered one prior conviction of a serious felony (§§ 667, subds. (a), (b)-(i), 1170.12).

Defendant was sentenced to 37 years in state prison. On count 1, the court imposed the middle term of six years, plus 20 years for the gun-use enhancement (§ 12022.53, subd. (c)).² As to count 2, the court imposed a consecutive term of two years (one-third the middle term of six years), plus six years eight months (one-third term of the 20-year gun-use enhancement). As to count 8, the court imposed a consecutive term of two years four months (one-third the upper term). The court imposed and stayed sentences on counts 3 through 11.

¹ All further statutory references are to the Penal Code.

² The trial court imposed a 20-year enhancement. It apparently misspoke when it stated it was imposing a sentence under section 12022.53, subdivision (b), which provides for a 10-year enhancement. The court should have imposed the 20-year enhancement under section 12022.53, subdivision (c). The abstract of judgment should be corrected to reflect one enhancement imposed under section 12022.53, subdivision (c), and one imposed and stayed enhancement under section 12022.53, subdivision (b), on counts 1 and 2 each. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

On appeal, defendant challenges the sufficiency of the evidence to support the verdicts as to assault with a firearm upon a peace officer in counts 1 and 2 and the sentence on count 8. We agree that the sentence imposed on count 8 was unlawful and should be modified. We also agree with the People that there is an error in the abstract of judgment concerning the sentence imposed on the personal use enhancement. The judgment is modified as requested by the People and the sentence in count 8 is also modified.

FACTS

On the night of October 15, 2005, at approximately 8:15 p.m., Siyon Atkins (Atkins) was driving in Los Angeles with three cousins and her daughter. She saw defendant and a woman arguing; defendant was holding a shotgun. Atkins stopped to see if the woman was safe. Defendant told her to move her car. When she refused, defendant pointed the shotgun at her car. As she then drove away, defendant shot the back of her car, blowing a hole in her trunk.

Atkins called the police, and they responded with lights and sirens. Atkins directed them to defendant's location, a house located behind a duplex. Defendant had barricaded himself inside. While Los Angeles Police Officer Ozzie Ramos was interviewing Atkins, numerous shots were fired through an opening in the attic of the house. A police helicopter arrived, illuminated the house with its spotlight, and circled the area.

A second round of gunshots came from the house, apparently going through the roof. A third round of gunshots rang out and portions of the roof flew into the air.

Officer Ozzie Ramos ordered defendant to surrender several times during the standoff. Defendant refused, and several SWAT officers took positions in the area. Officers Timothy McCarthy and Ivan Ramos took a position on the roof of a house. As they were attempting to move to another vantage point to see a balcony at defendant's location, three to six shots came from the attic opening. Officer Ivan Ramos, who was

next to Officer McCarthy, took cover to avoid getting hit. Officer McCarthy was reaching for his sniper rifle, when there was a second round of gunshots. He felt the shots were aimed at him.

After the area was contained, defendant stayed in the residence for about three hours while police attempted to negotiate with him. During the standoff, defendant tossed out some guns, including a loaded .22-caliber semiautomatic handgun and a 12-gauge shotgun. Eventually, defendant surrendered.

A search of the house resulted in the recovery of a .25-caliber semi-automatic handgun in the attic. Police recovered numerous expended cartridges, empty ammunition boxes, slugs and bullet fragments from the attic, the roof, elsewhere in the house and outside the house. A rifle slug was recovered from the taillight of Atkins's car. Tests of several of the expended cartridges showed that they matched the guns defendant possessed.

Defendant previously had been convicted of a felony.

DISCUSSION

Sufficiency of the Evidence of Assault with a Firearm Upon a Peace Officer³

“To assess the evidence’s sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond

³ Section 245, subdivision (d)(1), states: “Any person who commits an assault with a firearm upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for four, six, or eight years.”

a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Viewed in the light most favorable to the prosecution, substantial evidence shows that defendant knew or should have known he was shooting at police officers.

Defendant had barricaded himself in a house for nearly three hours. At the beginning of the standoff, several marked police cars arrived with lights flashing and sirens turned on. Spotlights were shined toward the home. A helicopter circled the home and shined a spotlight on the location. Several loud announcements were made outside defendant’s location, ordering him to exit. It is reasonably inferable from this evidence that defendant knew there were police officers outside the house.

SWAT Officers McCarthy and Ivan Ramos were wearing standard SWAT uniform and gear—dark blue outfits with heavy-duty bulletproof tactical vests, helmets with headset and communications equipment, and Los Angeles Police Department insignias on the sleeves. The jury saw photographs of the uniforms and diagrams and photographs of the various locations. After the officers moved to a nearby rooftop, defendant directed his aim towards that movement. Prior to the gunshots, the officers stood up and moved around the rooftop to look for the balcony at defendant’s residence. Based upon the lighting, another police officer, Officer Morales, testified that he was able to see the SWAT officers on the rooftop from his position on the ground.

Officer McCarthy opined that the gunshots were headed toward his sniper rifle and noticed the muzzle flashes change shape:

“Q: You said the muzzle flashes changed shape. What do you mean by that?

“A: Well, they went from kind of an elongated shape to a very small pinpoint bright light. In my opinion, it was directed at me.”

Officer McCarthy explained what he immediately heard:

“Q: Okay. And what happened after that?

“A: At that point I could hear the sound of bullets kind of whizzing by. Then I heard the sound of a round impacting right near where I was located. I then returned fire at that point.”

Defendant claims that he was simply “firing wildly out of” the attic opening in the dark. He suggests that the darkness coupled with the dark uniforms made it unlikely that he could see either of the SWAT officers. Given all the evidence including the light present from nearby streetlights, police and helicopter spotlights, and Officer Morales’s testimony that he was able to recognize the individuals on the rooftop as SWAT officers, it is certainly reasonable to believe that defendant was able to see the silhouettes of the two SWAT officers wearing tactical gear and helmets on a rooftop. It is equally clear from the evidence that defendant knew or should have known that he was shooting at SWAT officers and not merely two innocent bystanders who were just up on the roof enjoying the evening or doing late night roof repairs.

Imposition of the Upper Term Sentence on Count 8

Defendant contends that the trial court erred when it imposed one-third the upper term of seven years instead of one-third the middle term of five years. In imposing the consecutive term, the trial court selected one-third of the upper term of seven years, for a consecutive term of two years and four months. The People agree that the trial court imposed an unlawful consecutive sentence on count 8.

A violation of section 246 is punishable by three, five or seven years in state prison. Section 1170.1, subdivision (a), provides that when a court imposes a

consecutive sentence, the aggregate term of imprisonment for all the convictions must be the sum of the principal term plus one-third the middle term of the subordinate offenses and one-third the term of any additional enhancements applicable to those subordinate offenses.

Count 8 was a subordinate term to run consecutively to the principal term of count 1. Under section 1170.1, subdivision (a), the trial court should have imposed one-third the middle term of five years, which is one year eight months.

DISPOSITION

The judgment is modified to impose a consecutive term of one-third the middle term, one year and eight months, on count 8. As so modified, the judgment is affirmed.

The clerk of the court is directed to prepare a corrected abstract of judgment reflecting the imposition of one enhancement imposed upon section 12022.53, subdivision (c), of 20 years and one enhancement imposed and stayed under section 12022.53, subdivision (b), on counts 1 and 2. The corrected abstract of judgment should also reflect the imposition of a sentence of one-third the middle term, one year and eight months, on count 8. The clerk is directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.